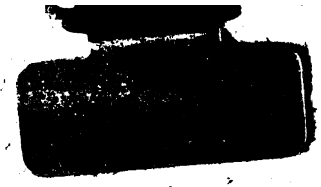


A. P. Pellatt

OBSERVATIONS

ON THE

EFENCE OF PURCHASE FOR VALUABLE CONSIDERATION WITHOUT NOTICE.

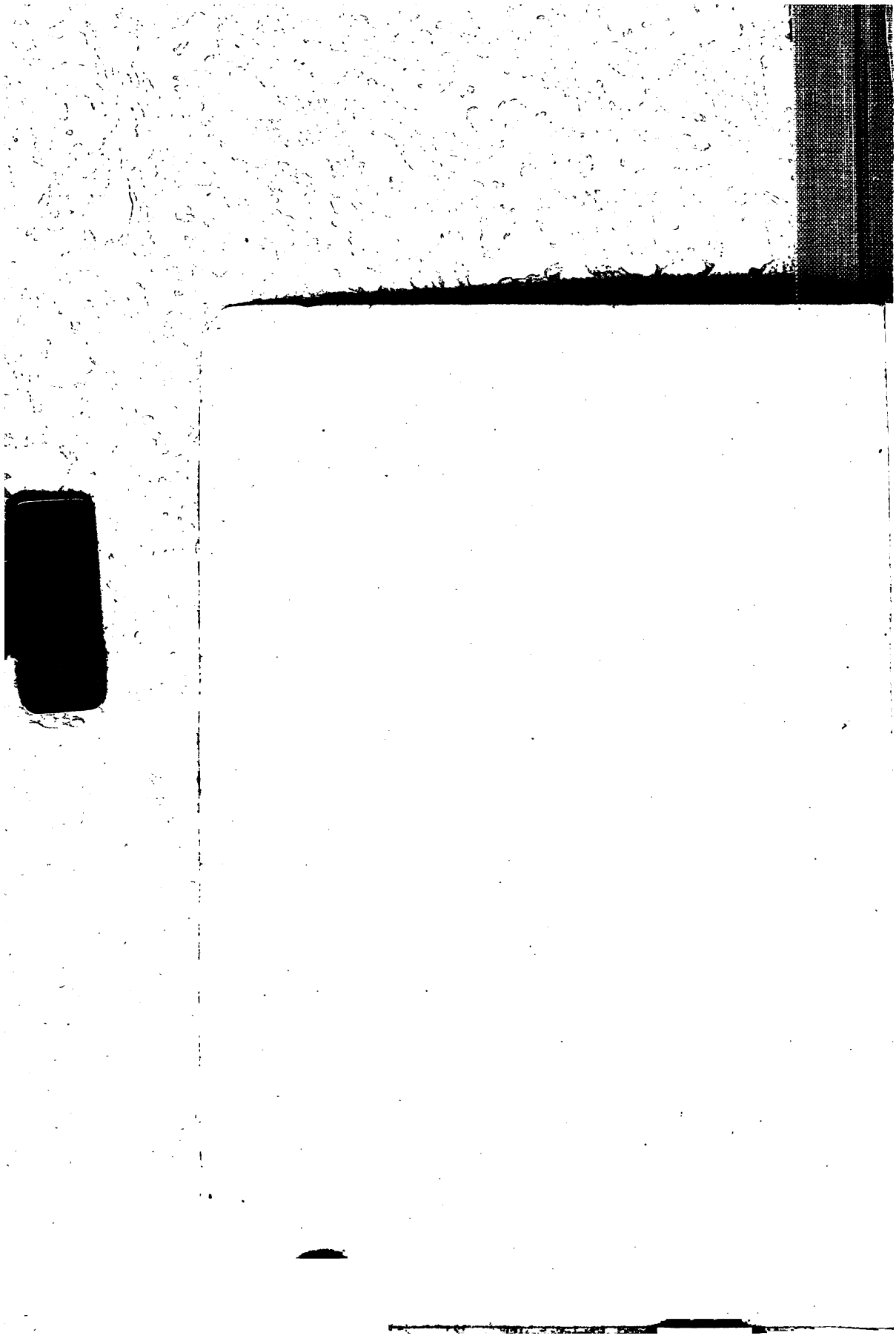
BY

FREEMAN OLIVER HAYNES,

OF LINCOLN'S INN, BARRISTER-AT-LAW,
FORMERLY FELLOW OF CAIUS COLLEGE, CAMBRIDGE.

LONDON:
WILLIAM MAXWELL & SON, 29, FLEET STREET, E.C.
Law Publishers and Booksellers.
1880.

Price One Shilling.



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BRADBURY, AGNEW, & CO., PRINTERS, WHITEFRIARS.

TO

THE HONOURABLE

BARON POLLOCK

The following Sketch

IS DEDICATED,

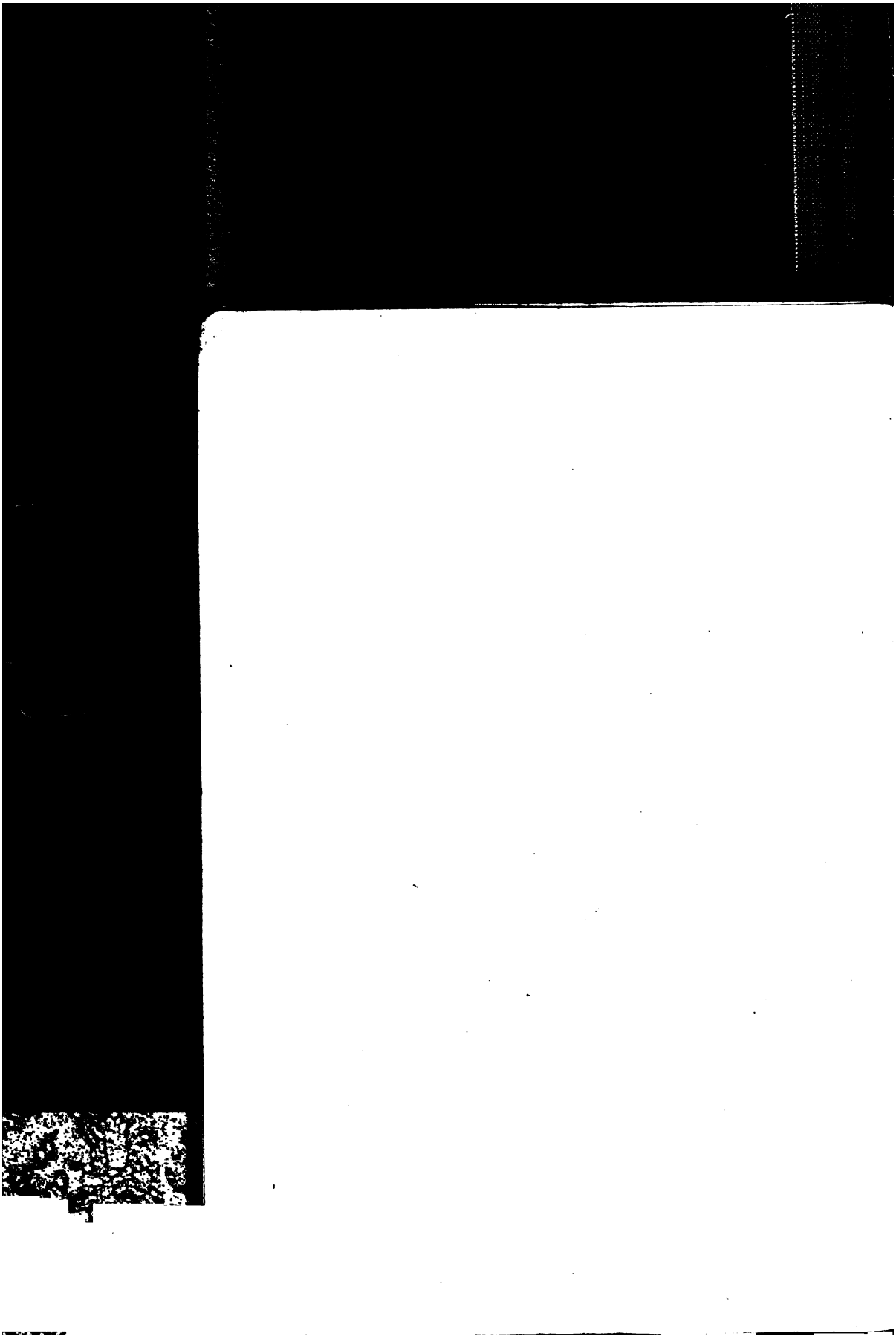
WITH REGRET THAT THE OFFERING

SHOULD NOT BE MORE PROPORTIONATE TO THE AUTHOR'S

RESPECT FOR HIM AS A LAWYER

AND

AFFECTION FOR HIM AS A FRIEND.



PREFACE.

THE following pages make no pretence to the dignity of a Treatise on the subject of "Purchase for Valuable Consideration without Notice."

They amount only to an attempt to elucidate the circumstances under which the Defence of Purchase for Valuable Consideration without Notice may be successfully set up, and, so far as possible, the general principles which determine the applicability or otherwise of the defence; and they are offered merely as a contribution towards the investigation of a subject which seems worthy of more attention than it has hitherto received.

The conflicting views entertained by Lord St. Leonards and Lord Westbury respecting the cases of *Williams* v. *Lambe* and *Collins* v. *Archer* will, it is hoped, be regarded as sufficient excuse for the length at which those decisions have been discussed.

LINCOLN'S INN,
March 31, 1880.

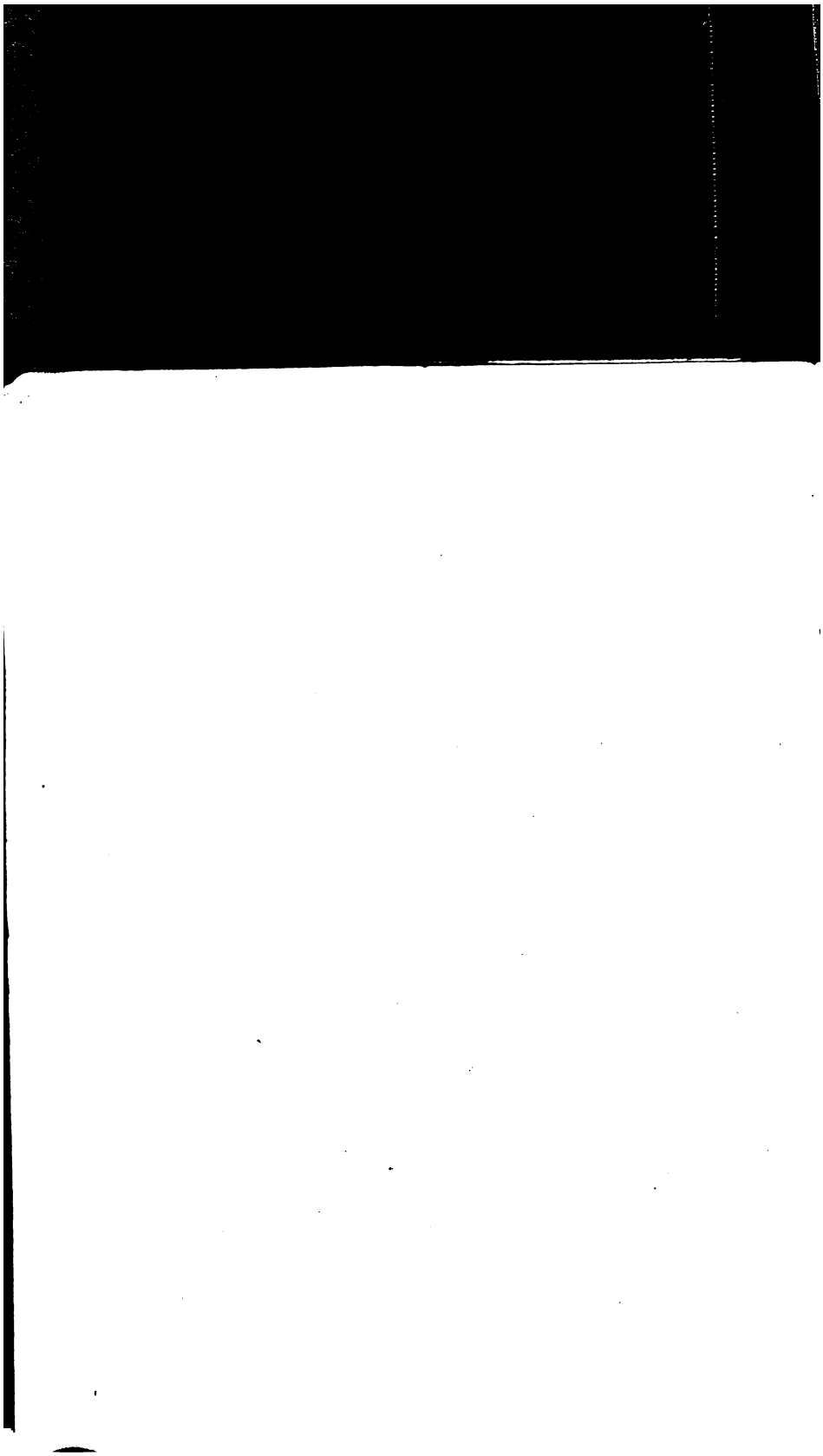


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TABLE OF CASES.

ON THE

DEFENCE OF PURCHASE FOR VALUABLE CONSIDERATION WITHOUT NOTICE.

CHAPTER I.

It is proposed to give in the following pages a sketch or outline of the Equity doctrine in respect to the defence of purchase for valuable consideration without notice, distinguishing what may be considered as settled from what must be regarded as still uncertain.

This investigation cannot be considered as of mere speculative interest, for the Judicature Act, 1873, provides that the High Court and every judge thereof, shall give to every equitable defence the same effect as the Court of Chancery ought to have given to it in any suit or proceeding instituted in that Court before the passing of the Act (*a*); and that generally where there is any variance between the rules of Equity and the rules of the Common Law with reference to the same matter, the rules of Equity shall prevail (*b*).

We will endeavour first to ascertain as nearly as we can what were the rules and doctrines of the Court of

(*a*) Section 24, subsection (2).
(*b*) Section 25, subsection (11).

Chancery with respect to the defence of purchase for value without notice, and then consider their application, or possible application, to litigation arising or to arise since the Court of Chancery became merged in the Supreme Court.

It may be premised that by "*Purchaser for valuable consideration without notice,*" is meant a person who has paid or given money or money's worth for property, or some interest in property, without knowledge or the reasonable means of knowledge, of some claim against the property, or the interest therein purchased, already subsisting at the time when the consideration was paid: and the occasion for the defence arose upon the person entitled to the prior undisclosed claim taking some proceeding in the Court of Chancery impeaching or tending to impeach the title of the purchaser.

The question is, under what circumstances and to what extent was the defence a bar to such proceedings, and what is the rule or principle which governs or determines the validity, or otherwise, of the defence.

Now a reference to the judicial authorities discloses an amount of conflict in the decisions greater, perhaps, than has attended the development of any other Equity rule or doctrine; and such statements as we find of any general principle are almost equally at variance.

In many cases decided by judges of the highest authority, we find expressions which, taken literally, amount to this, that the defence is, under all circumstances, an absolute, unconditional bar.

Thus Lord Northington says (*a*): "A purchaser "without notice for a valuable consideration is a bar "to the jurisdiction of the court." Lord Loughborough, though he certainly did not always adhere to the principle (*b*), is found saying on one occasion (*c*): "I think it has been decided that against a purchaser "for valuable consideration without notice, the court "will not take the least step imaginable." Lord Eldon, in a celebrated judgment, expresses himself thus: "I am not aware *that* follows as a principle of "sound equity *if the principle* of the court is that "*against a purchaser for valuable consideration without* "*notice the court gives no assistance*" (*d*). Lord St. Leonards says: "In my opinion, whether the pur-"chaser has the legal estate, or only an equitable "interest, he may, by way of defence, avail himself of "the character of a purchaser without notice, and is "entitled to have the bill dismissed against him, "though the next hour he may be turned out of "possession by the legal title" (*e*). And Lord Romilly says: "My opinion is that, when once you "establish that a person is a purchaser for value "without notice, this court will give no assistance "against him, but the right must be enforced at "law" (*f*).

Now the first observation to be made upon this

(*a*) Stanhope *v.* Earl Verney, 2 Eden, 81 ; see p. 85.
(*b*) See Strode *v.* Blackburne, 3 Vesey, 222.
(*c*) Jerrard *v.* Saunders, 2 Vesey jun., 454 ; see p. 458.
(*d*) Wallwyn *v.* Lee, 9 Vesey, 24 ; see p. 34.
(*e*) Bowen *v.* Evans, 1 Jones & Latouche, 178 ; see p. 264.
(*f*) Attorney-General *v.* Wilkins, 17 Beavan, 285 ; see p. 293.

apparently overwhelming concurrence of high legal authority is that the acceptance of the principle, as laid down in its simple unqualified form, would be repugnant to the every day practice of the Court of Chancery and of its virtual successor the Chancery Division of the High Court of Justice.

For instance it is clear that the defence has no application where a person claiming as *cestui que trust* invokes the jurisdiction of the court to obtain distribution or administration of a trust fund which is either in the custody of the court itself or in that of a third person who is before the court in the character of trustee. If, in such a case, the fact that a claimant later in point of time of purchase was a purchaser for value without notice could be regarded as a reason for the court not exercising its ordinary jurisdiction, the result would be to paralyse the action of the court altogether; since clearly the claimant earlier in time of purchase must have taken without notice of rights which were not even existent when his own were acquired.

Some limitation or qualification of the principle as so stated is absolutely necessary. What is it?

The reported decisions afford, so far as the writer is aware, no direct answer to this question. In a case which came before Lord Westbury, and in which the universal, unqualified nature of the defence was strongly insisted on at the bar, his lordship, while denying the universal application of the defence, made no attempt to define completely the limits to its application, but contented himself with classifying the cases in which

the defence had been held to be properly applicable, and with distinguishing the case before him from those so classified (*a*). The judgment of Lord Westbury has been the subject of much comment, and cannot, it is considered, be regarded as unimpeachable in all respects; but the classification of cases adopted by him is sufficiently accurate for general purposes, and, as it is the only one possessing any sanction of judicial authority, it is proposed to adopt it here for the purpose of discussing and considering the cases themselves. After this discussion, but not until then, some attempt may perhaps be usefully made to discover the principle or circumstances limiting the application of the defence.

Lord Westbury says in effect, in the case referred to, There appear to be three cases in which the use of this defence is most familiar.

(I.)—Where an application is made to the *auxiliary* jurisdiction of the Court by the possessor of a legal title, in which case the defence (Lord Westbury says) is good; and the reason given is that, as against a purchaser for value without notice, the court gives no assistance—*that is no assistance to the legal title.*

But (Lord Westbury continues) this rule does not apply where the Court exercises a legal jurisdiction concurrently with Courts of Law; and he cites, in support of this exception, *Williams* v. *Lambe* (*b*), and *Collins* v. *Archer* (*c*).

(*a*) Phillips *v.* Phillips, 4 De Gex, Fisher & Jones, 208.
(*b*) 3 Brown's Chancery Cases, 263.
(*c*) 1 Russell & Mylne, 284.

(II.)—Where there are several purchasers or incumbrancers, each claiming in equity, and one who is later in time succeeds in obtaining an outstanding legal estate, or some other legal advantage; and the principle is that a Court of Equity will not disarm a purchaser, which is the common doctrine of the "*tabula in naufragio.*"

(III.)—Where there are circumstances that give rise to an equity as distinguished from an equitable estate, as for example an equity to set aside a deed for fraud or to correct it for mistake.

Following then Lord Westbury's classification, let us first consider the cases of application by the possessor of a legal title to the auxiliary jurisdiction of the Court of Chancery.

These cases may be conveniently ranged under the heads of bills for discovery in aid of proceedings at law, bills for discovery and for the delivery up of title-deeds (*a*) or for the removal of terms, and bills to perpetuate testimony.

(*a*) Lord Westbury in his classification, expressly mentions a bill for the delivery of title deeds (referring to Wallwyn *v.* Lee) as an instance of application to the auxiliary jurisdiction of the Court, and we are here merely following his classification; but the question whether a particular head of Equity jurisdiction should more properly be regarded as "exclusive," "concurrent," or "auxiliary," is often attended with difficulty. Thus "specific performance" might be considered "exclusive" in so far as a Court of Equity alone afforded the particular remedy, "concurrent" in so far as it exercised concurrently with Courts of Law jurisdiction in respect to the particular contract of sale, and "auxiliary" in so far as the particular remedy afforded by the Court of Equity aided the defectiveness of the remedy given by the Common Law Court. According to the last of these aspects, a bill for the delivery of title deeds would correctly be regarded as an application to the "auxiliary jurisdiction."

As respects bills for discovery, the leading case of *Bassett* v. *Nosworthy* (*a*) is one of the earliest and most authoritative decisions. There an heir-at-law filed his bill against a person claiming as purchaser from the devisee under the will of his ancestor in order to discover a revocation of the will. The defendant pleaded that he was a purchaser for valuable consideration *bonâ fide* and without notice of any revocation, and the plea was allowed; and upon the truth of it being established by evidence, the bill was dismissed.

The bill sought also to set aside incumbrances which the defendant had bought in to protect his purchase.

In delivering judgment, Lord Nottingham (then Lord Keeper Finch) thus expresses himself:—"A "purchaser *bonâ fide* without notice of any defect in "his title at the time of the purchase made may "lawfully buy in a statute or mortgage or any other "incumbrance, and if he can defend himself at law by "any such incumbrance bought in, his adversary shall "never be aided in a Court of Equity by setting aside "such incumbrances, for Equity will not disarm a "purchaser."

A more distinctly typical instance of the simple bill for discovery occurs in the case of *Jerrard* v. *Saunders* (*b*), which came twice before Lord Loughborough. On the first occasion, although the defence of purchase for value without notice had been pleaded, Lord

(*a*) Reports *temp.* Finch, 102.
(*b*) 2 Vesey jun., 187, 454.

Loughborough held that the purchaser must answer on oath as to all facts relevant for the purpose of determining whether he actually had notice. Upon an answer being put in, in submission to the decision, an attempt was made to extract further discovery going beyond the question of notice. And thereupon Lord Loughborough held the answer sufficient, saying: "I am perfectly satisfied upon the general reasoning "that this Court will never extend its jurisdiction to "compel a purchaser, who has fully and in the most "precise terms denied all the circumstances men- "tioned as circumstances from which notice may be "inferred, to go on to make a further answer as to all "the circumstances of the case that are to blot and "rip up his title. To do so would be against the "known established principles of the Court."

Then follow the words already quoted: "I think it "has been decided that, against a purchaser for valu- "able consideration without notice, this Court will not "take the least step imaginable."

We will now consider bills for the delivery up of title deeds.

At law, antecedently to the Common Law Procedure Act, 1854, which conferred powers to compel specific delivery of chattels (though by distress only—a somewhat ineffectual process), the legal owner of title deeds could recover from the wrongful possessor of them in an action of *trover* damages only, and in an action of *detinue* the deeds themselves or, at the option of the person wrongfully detaining them, their assessed value.

In a fitting case the Court of Chancery supplied this defect in the Common Law jurisdiction by ordering the wrongful holder of the deeds to deliver them up to the rightful owner.

In *Wallwyn* v. *Lee* (*a*), a tenant for life under a settlement suppressing the settlement affected to mortgage the property in which he had a life estate only, and handed over the earlier deeds to the mortgagee.

On his death the remainderman under the settlement filed a bill for discovery and to have the deeds delivered up. The mortgagee pleaded that he was a purchaser for value without notice. And Lord Eldon upheld the defence.

At first blush the decision seems of doubtful policy. Tenants for life of settled estates are habitually, as of right, the holders of the title deeds of the property in settlement, and the result might seem to be to favour the wrongful deposit of such deeds. The question, however, was not one of policy, but of the principle by which a Court of Equity was to be governed in such cases. And pursuing its own principles, the Court gave to the remainderman who was legally entitled to the deeds no assistance against the purchaser for value without notice, but at the same time left him free to assert his rights at law as best he might.

Lord Eldon, after adverting to the imperfection of the jurisdiction at law in reference to the recovery of the deeds, and pointing out that the plaintiff was

(*a*) 9 Vesey, 24.

seeking the special assistance of a Court of Equity to recover possession of them, said: "Is it not worth "consideration whether the very principle of this plea "is not this. I have honestly and *bonâ fide* paid for "this, in order to make myself the owner of it, and "you shall have no information from me as to the "perfection or imperfection of my title, until you "deliver me from the peril in which you state I have "placed myself in the article of purchasing *bonâ fide.* "Is it not worth consideration whether every plea of "purchase for valuable consideration without notice "does not admit that the defendant has no title? If "he has a good title, why not discover? I apprehend "there is sufficient ground for saying a man who has "honestly dealt for valuable consideration without "notice shall not be called upon by confessions wrung "from his conscience to say he has missed his object "in the extent in which he meant to acquire it.

* * * * *

"Next, the possession of the deeds at least is a "thing purchased with the estate, and if it happens "that the purchase misses its object to this extent "that the purchaser has had the possession taken "from him without the assistance of the Court, is "there a clear principle that therefore the possession "of the deeds shall, with the assistance of the Court, "be recovered by that person who so obtained posses-"sion of the estate? I am not sure that follows as a "sound principle of Equity; if the principle of the "Court is that against a purchaser for valuable consi-"deration, this Court gives no assistance."

Lord Eldon, after thus characteristically disclosing his own views on the subject behind a thin though continuous veil of interrogation and hypothesis, in the first instance reserved final judgment, mainly in consequence of the recent previous decision of Lord Loughborough in *Strode* v. *Blackburne* (*a*), which Lord Eldon felt to be wrong, but was unwilling to overrule without due consideration, and ultimately allowed the plea.

In *Wallwyn* v. *Lee*, the handing over of the deeds was an adjunct, so to speak, to a fraudulent mortgage by a tenant for life.

The more recent authorities seem to suggest a doubt whether the principle of that decision applies to a case in which the whole transaction consists in a mere wrongful deposit of deeds.

In the case of *Joyce* v. *De Moleyns* (*b*), decided by Lord St. Leonards, when Lord Chancellor of Ireland, the heir at law of a former owner of impropriate tithes, the true title to which was in a devisee thereof under the owner's will, deposited the title deeds relating thereto with his bankers. The bill sought delivery up of the deeds, but Lord St. Leonards considered that no relief could be given in equity against the bankers, they being purchasers for value without notice, and dismissed the bill as against them with costs.

In the subsequent case of *Newton* v. *Newton* (*c*),

(*a*) 3 Vesey, 222.
(*b*) 2 Jones & Latouche, 374.
(*c*) L. R. 6 Eq. 135.

Lord Romilly considered that a distinction existed between the case of a deposit by a person who has some possibility of interest (as the owner of the equity of redemption who has already created charges but retained the deeds), and that of a deposit by a person who has no *scintilla* of interest, such as a mortgagee who is a mere trustee for others, and held that in the latter case a decree could properly be made directing the deeds to be delivered up by the person with whom they had been improperly deposited, though without notice on his part of the trust.

It is not easy to reconcile this view with *Wallwyn* v. *Lee*.

In that case the tenant for life who handed over the deeds had certainly, at the time when he so handed them over, an interest in the land and in the deeds, but by his death every *scintilla* of interest had vanished.

However, Lord Romilly having, as he considered, by means of this distinction freed himself from the authority of *Wallwyn* v. *Lee*, came to a decision in direct opposition to that of Lord St. Leonards in *Joyce* v. *De Moleyns*.

There was an appeal in *Newton* v. *Newton* (*a*) which succeeded on the ground that upon a due consideration of the material facts, the money advanced by the mortgagee was not trust money, but that of the mortgagee himself; but Lord Hatherley, in delivering the judgment of the Court of Appeal, stated that although

(*a*) L. R. 4 Ch. 143.

the Judges of Appeal had arrived at a different conclusion from Lord Romilly on the evidence, they wished to be understood as not entertaining any opinion adverse to that expressed by him upon the question of law. And his decision that the title deeds might properly be ordered to be delivered up was treated as possibly justifiable.

Lord Hatherley said:—"There appears to us to be "a material distinction between *Wallwyn* v. *Lee* and "cases in which either in consequence of the fund "being in Court as in *Stackhouse* v. *Countess of* "*Jersey* (*a*), or in consequence of the legal estate "being outstanding in a trustee, and the beneficial "interest being claimed by several adverse but equally "innocent purchasers for value without notice, the "Court is called upon to declare and does declare "the right to the fund or estate in question. In "such cases the Court is necessarily called upon "to make, and does make, a decree against some "one or more of such purchasers for value, but

* * * * *

"such a decree would obviously be incomplete "in a material particular, if while declaring the "plaintiff to be absolutely entitled to the whole "beneficial interest in the estate it left the title "deeds in the possession of one of the defendants "claiming to hold them under an adverse title which "the same decree declared to have no valid foundation."

(*a*) See this case reported, 1 Johnson & Hemming, 721.

Upon the distinction thus suggested by Lord Hatherley, two observations occur:—The first, that in such cases as *Wallwyn* v. *Lee* and *Joyce* v. *De Moleyns*, the value to the purchaser of the defence set up by him was materially lessened by the circumstance that after all he remained liable at law in an action of trover or detinue, and yet the Court of Equity declined to deprive him of such small advantage as the possession of the deeds might confer. In such a case as *Newton* v. *Newton*, no action, as it would seem, would have lain at law, and by the decree to deliver up the deeds the far more substantial advantage possessed by the purchaser would be taken away.

The second is that Lord Hatherley would seem to regard such a case as *Newton* v. *Newton* as not falling properly within Lord Westbury's first class and the doctrine established by *Wallwyn* v. *Lee* as being therefore not applicable.

However, in the more recent case of *Heath* v. *Crealock* (*a*), which was that of a purchase from a mortgagor, the mortgage being fraudulently suppressed, the Court of Appeal, while giving relief by way of foreclosure against the purchaser, who had not the legal estate, held that it could not properly direct him to deliver up the deeds in his possession.

This case must be regarded as completely rehabilitating (if this were needed) the decision in *Wallwyn* v. *Lee*. It establishes, moreover, incidentally, that the

(*a*) L. R. 10 Ch. 28; followed in Waldy *v.* Gray, L. R. 20 Eq. 238.

principle of that decision is not to be infringed even indirectly.

On the hearing in the Court below a decree had been made, under the statutory power, for sale instead of foreclosure, and, as incidental to the sale, for delivery of the deeds by the purchaser for value. On appeal the Lord Chancellor pointed out that the Court was not in the habit of ordering a sale unless it could go on and give possession, and insure the handing over of the title deeds, and that this was precisely what the Court could not properly do against a purchaser for value without notice, and that for that very reason the decree ought to be varied by decreeing foreclosure and not a sale. And Lord Justice James, after laying down that the Court had no right to interfere with the purchaser for value, went on to say that it would be interfering with him "If, through the form "of a decree directing a sale instead of a foreclosure, "or anything of that kind, it merely did indirectly "that which it could not do directly—deprive him of "possession of the land (*a*) or deeds."

(*a*) Lord Westbury in Phillips *v.* Phillips, 4 De Gex, Fisher & Jones, 208, see page 218, denied that possession of the land ought to be regarded as a legal advantage of which a purchaser for value is not to be deprived, saying: – "It was indeed said at the Bar that the defendants being in "possession had a legal advantage in respect of the possession of which "they ought not to be deprived. But that is to confound the subject of "adjudication with the means of determining it. The possession is the "thing which is the subject of controversy, and is to be awarded by the "Court to one or to the other. But the subject of controversy, and the "means of determining the right to that subject, are perfectly different. "The argument, in fact, amounts to this: I ought not to be deprived of "possession, because I have possession. The purchaser will not be

The principle of decision applicable to cases of bills for discovery, or for discovery and delivery up of title deeds, applied equally to bills by a legal owner to prevent the defendant sued by him in ejectment from setting up old terms or other legal interests.

This is established by the passage from *Bassett* v. *Nosworthy* already cited (*a*), to which may be added, as a fair typical instance, the modern case of *Goleborn* v. *Alcock* (*b*).

In that case a lease for 61 years had been granted by a person who represented himself to be owner in fee, whereas he was, in fact, only tenant for life, with power of leasing, and the lease was bad as not being in conformity with the power.

On the death of the tenant for life the remainderman brought ejectment against the assignee of the lessee, who thereupon got in some old terms. The bill sought to restrain the assignee of the lease from setting up the terms, but it was held that he was entitled to do so, and the bill was dismissed with costs.

The same principle applied also, it is conceived, to bills for the perpetuation of testimony.

In *Jerrard* v. *Saunders* (*c*), we find Lord Loughborough saying:—"In reference to a purchaser for "valuable consideration without notice, I believe it is "decided that you cannot even have a bill to per-"petuate testimony against him."

"deprived of anything that gives him a legal right to the possession, "but the possession itself must not be confounded with the right "to it."

(*a*) Ante, p. 7.

(*b*) 2 Simons, 552.

(*c*) 2 Vesey jun., 454; see p. 458.

The case which Lord Loughborough had in his mind was probably *Bechinall* v. *Arnold* (*a*), which was a bill by a devisee to prove a will and perpetuate the testimony of the witnesses to it. The defendant pleaded purchase without notice, and the plea was allowed.

The case is not a thoroughly satisfactory authority, because it does not appear that there was anything to prevent the plaintiff from bringing ejectment against the purchaser; and the arguments presented to the Court on behalf of the purchaser for value were rather arguments in support of a demurrer to the bill for want of equity than in support of the plea. Still the fact remains that the plea was allowed.

We pass now from Lord Westbury's first class of cases, viz., those in which the application is to the auxiliary jurisdiction of the Court; to the exception laid down by him, and in support of which he cites *Williams* v. *Lambe* (*b*), and *Collins* v. *Archer* (*c*), to the effect that the defence does not apply when the Court exercises a legal jurisdiction concurrently with Courts of law.

These two decisions will require a detailed examination.

Their history is as singular as that of any that have contributed to the creation of case-made law; and their ultimate fate, as decisions, must be regarded as still doubtful.

(*a*) 1 Vernon, 354. (*b*) 3 Brown's Chancery Cases, 263.
(*c*) 1 Russell & Mylne, 284.

They were originally in terms rested, or considered to have been rested, by the Judges who decided them on a supposed doctrine, that a plea of purchase for valuable consideration is of no avail against a plaintiff who comes into equity asserting a legal title; and the special notice which they have attracted has been due mainly to that circumstance.

They must now be upheld, if at all, by means of the distinction suggested by Lord Westbury.

The doctrine on which they were founded has been authoritatively denied to exist, and yet the decisions themselves have been treated as binding as well by one of the Judges who repudiated the existence of the doctrine (*a*), as by Lord Westbury in making the exception which is now under consideration.

It will be more convenient to consider the alleged doctrine first.

We find it alluded to in an early case (*b*), in which Lord Nottingham is represented as saying, "Where "the plaintiff hath a title in law, there, though the "defendant doth purchase without notice, yet he shall "discover writings, but otherwise it is if the plaintiff "hath only a title in equity; for there, if the defendant "purchased without notice he shall never discover nor "make good the plaintiff's title."

However, in a case occurring less than four years earlier, and contained in the very same volume (*c*),

(*a*) Lord Romilly, see Attorney-General *v.* Wilkins, 17 Beavan, 285; Finch *v.* Shaw, 19 Beavan, 500, at p. 509.

(*b*) Rogers *v.* Seale, 2 Freeman, 84; H. T. 1681.

(*c*) Burlace *v.* Cook, 2 Freeman, 24; T. T. 1677.

Lord Nottingham is reported as not only deciding that an heir relying on a legal title has no right to discovery, but as saying that "the Court will not compel "the showing of writings to any person unless he "hath an equitable title, as a mortgagee."

It is to be noted, moreover, that any such decision as that in *Rogers* v. *Seale* would have been distinctly opposed to Lord Nottingham's considered and fully reported judgment in *Bassett* v. *Nosworthy* (*a*), already discussed.

In truth, these old cases in Freeman's Reports are too shortly and too imperfectly reported to carry any weight.

Neither does *Rogers* v. *Seale*, nor indeed either *Williams* v. *Lambe*, or *Collins* v. *Archer*, contain any judicial statement of the ground upon which the supposed doctrine was founded.

It may possibly have arisen from some ill-considered application of the reason sometimes alleged, in cases falling within Lord Westbury's second class, for the non-interference of the Court against a purchaser for value without notice, viz., that he has an equal equity and also law in his favour (*b*), (say by getting in an outstanding legal estate), and thence it may have been inferred, however unsoundly, that when a man comes to a Court of Equity, having both law and an equal equity, the Court ought to give him relief against the purchaser for value having only an equal equity.

(*a*) Reports *temp.* Finch, 102.

(*b*) See Belchier *v.* Butler, 1 Eden, 523, p. 529; Lowther Carleton, Cases *temp.* Talbot, 187.

In *Collins* v. *Archer* (*a*), presently to be considered, an attempt was made at the Bar to support the supposed doctrine by the argument that "a defendant in "order to avail himself of the plea of being a pur- "chaser without notice, must have either the legal "estate, or a better right than the plaintiff to call for "the outstanding estate; and consequently that that "plea can never be made use of against a plaintiff "who relies on a legal title."

The answer to this argument is, that except in the cases falling under or resembling those in Lord Westbury's second class and presently to be considered; it is certainly not necessary that a defendant should have the legal estate, or a right to call for it, in order to entitle him to set up the defence; and even if the argument could be regarded as sound, we find no trace of its having been judicially adopted.

The question seems generally to have been viewed almost as one of a technical rule, supported by some decisions and opposed by others, but for which no principle or reason is assigned, except perhaps by those setting up the defence, on whose part the contention has been that according to the general principles of equity, the defence ought to be considered as an absolute unqualified bar under all circumstances.

A short summary of the decisions bearing on the point down to and including *Bowen* v. *Evans* (*b*), will be found in the 11th edition of Lord St. Leonards' Vendors and Purchasers, upon the result of which

(*a*) 1 Russell & Mylne, 284, see page 288.
(*b*) 1 Jones & Latouche, 263.

Lord St. Leonards expresses his opinion to be that the defence holds good against a legal title; but there is no discussion or elucidation of the principle upon which the question in doubt is to be determined.

In *Joyce* v. *De Moleyns* (*a*), already discussed, Lord St. Leonards held that the defence of purchase for value without notice, was a shield as well against a legal as an equitable title; and in a case decided in 1853, (*b*), Lord Romilly, after pointing out the weakness already adverted to (*c*), of the argument in *Collins* v. *Archer*, continued thus: "The cases of "*Wallwyn* v. *Lee* and *Joyce* v. *De Moleyns*, expressly "determine that the defence of purchase for value "without notice is a good defence where the right "sought to be enforced is a legal right; and I have in "vain endeavoured to discover upon what ground it "can be held that it is not a defence against a legal "claim in this Court. This Court certainly does not "favour legal any more than equitable rights, but "rather the contrary."

Further on in the same case we find Lord Romilly marshalling, so to speak, in opposite ranks, without any detailed discussion of them, the decisions supporting and those negativing the soundness of the supposed doctrine, the former of which consist solely of *Rogers* v. *Seale*, *Williams* v. *Lambe*, and *Collins* v. *Archer*, to which, it is believed, no addition could have been made.

(*a*) 2 Jones *v.* Latouche, 374.
(*b*) Attorney-General *v.* Wilkins, 17 Beavan, 285; see page 292.
(*c*) Ante, page 20.

In a case decided by him only a year later (*a*), and which we shall have to consider further on, we find Lord Romilly referring to *Williams* v. *Lambe* and *Collins* v. *Archer*, in terms which appear to recognize them as valid decisions upon special grounds, but only after reiterating his view that the defence of purchase for value without notice applied as well against a legal right as an equitable right.

Finally, in the case of *Phillips* v. *Phillips* (*b*), from which we have taken our classification, decided by Lord Westbury in 1862, we again find *Williams* v. *Lambe* and *Collins* v. *Archer*, treated as valid decisions, but only on the special ground that in them the Court was asked to exercise a branch of concurrent jurisdiction; so that in the result *Rogers* v. *Seale*, the untrustworthiness of which has already been exposed (*c*), is alone left to support the supposed doctrine, a doctrine opposed to the whole of the cases contained in our first class, and which may justly be regarded as exploded.

Let us now consider the two cases themselves.

Williams v. *Lambe* (*d*), was that of a bill by a widow praying discovery of the lands out of which she was dowable, and an assignment of dower.

At that time a widow might either sue for her dower at law, or file a bill in equity for the same purpose. The jurisdiction of the Court of Chancery as to dower, was technically concurrent only with that of

(*a*) Finch *v.* Shaw, 19 Beavan, 500.
(*b*) 4 De Gex, Fisher & Jones, 208.
(*c*) Ante, page 19.
(*d*) 3 Brown's Chancery Cases, 263.

the Common Law Courts; but in practice its superior efficacy led to its being almost exclusively resorted to.

This superior efficacy lay in the power of the Equity Court, to compel purchasers from the widow's husband to disclose the facts requisite to determine whether the widow was or not dowable out of the lands purchased by them.

To the bill of the widow, in *Williams* v. *Lambe*, a plea of purchase for valuable consideration without notice, going to the relief as well as the discovery, was put in.

Lord Thurlow is reported as saying: "The only "question was, whether a plea of purchase without "notice would lie against a bill to set out dower: that "he thought where the party is pursuing a legal title, "as dower is, that plea does not apply, it being only "a bar to an equitable not to a legal title: he there-"fore overruled the plea."

The first observation that occurs upon this case is, that it is somewhat difficult to see how the plea of purchase for value without notice could ever properly apply to a bill for dower. Dower is not a claim of the existence of which a purchaser can, in the absence of distinct notice, have no notion or suspicion. The purchaser buys from a vendor of full age. It might well be said that he is bound to take notice that the vendor is or may be married, and that if he choose to make no inquiry on so important a point he must abide the consequences of his omission.

We pass by, however, the difficulty referred to, and proceed to the question whether, notwithstanding the broad ground on which Lord Thurlow based his judg-

ment, the case may not be regarded as having really decided nothing more than that the Court would, notwithstanding the plea of purchase for value without notice, exercise its ordinary concurrent jurisdiction of assigning dower to a widow.

A learned author (*a*), in referring to the decision, upholds it as sound, saying: "When it is admitted " that dower is a mere legal right, and that a court of " equity, in assuming a concurrent jurisdiction with " courts of law, professedly acts upon the legal right, " that court, in analogy to law, where such a plea " would not be looked at, decides that in this instance " the same equitable plea is also inadmissible. This " analogy, it is obvious, does not hold when the widow " applies for equitable relief, as the removal of terms, " &c. In such cases, the equitable plea of being a " purchaser for value without notice cannot, as it " would seem, be resisted. In the first case, the " widow, proceeding upon the concurrent jurisdiction " of the court, merely enforces a right which the " defendant cannot at law resist by such a mode of " defence; in the second case she applies to the equity " of the court to take away from him a defence which " at law would protect him against her demand."

It is not clear whether Mr. Roper, in this passage, intended to put "*discovery*" on the same footing as "*removal of terms*." It certainly should be, and the argument for the plaintiff, in *Williams* v. *Lambe*, as shortly reported, would seem to have been: "It may

(*a*) Roper on Husband and Wife, vol. i. 446, 1st ed.

'be admitted that the plaintiff is not entitled to dis-
" covery, but at all events the plea is bad as going to
" relief as well as discovery."

That the plea was in fact a good plea to the discovery prayed must be considered as established by the decision of the Court of Common Pleas in the case of *Gomm* v. *Parrott* (*a*), in the year 1857.

There a widow, instead of adopting the ordinary course of filing a bill in equity, brought a writ of dower at law. She then applied for inspection of the purchaser's purchase deed under the 50th section of the Common Law Procedure Act, 1854, which authorised the Court to make an order for inspection of any document, to the production of which either party is entitled *for the purpose of discovery or otherwise.* The purchaser met the application by swearing that he was a purchaser for value without notice, and contending that as a Court of Equity would not under such circumstances have compelled a discovery, neither could the Court of Law do so under its new jurisdiction.

Thus incidentally a review of Lord Thurlow's decision in *Williams* v. *Lambe,* and of the later authorities, became requisite; and the Court of Common Pleas, after such review, held that the weight of authority was greatly in favour of the proposition that no bill for a discovery could have been maintained, that the defence therefore applied to the case under consideration, and that the demandant (*i.e.,* the plaintiff) in the writ was not entitled to inspection.

(*a*) 3 Jurist, N. S. 1150; 3 Com. B., N. S. 47.

v. *Lambe*, as decided by Lord Thurlow, in which nothing was said at the bar or otherwise about concurrent jurisdiction, and in which the law is laid down broadly that the defence is "*only a bar to an equitable not to a legal title*," is the case which is followed.

It appears, however, from another part of Sir John Leach's judgment, that the circumstance that he was exercising a head of concurrent jurisdiction was present to his mind, for in reference to a subordinate question, viz., as to the time from which the account should be taken, he expressed himself as follows :—

"In these cases a Court of Law and a Court of "Equity have concurrent jurisdiction; and inas- "much as in a Court of Law the plaintiff could "recover the arrears for six years before the com- "mencement of the action, the defendant here must "account for the tithes for the six years previous to "the filing of the bill."

It is from this portion of the judgment, no doubt, that Lord Westbury derived the conclusion that the true "*ratio decidendi*" of *Collins* v. *Archer* was that the application was to the concurrent jurisdiction of the Court, and having reached that conclusion, he applied, by an "*ex post facto*" process, the same explanation to the decision of *Williams* v. *Lambe*, which neither in argument nor in judgment contains any allusion to the circumstance of the concurrent jurisdiction being invoked.

In an elaborate review by Lord St. Leonards in the fourteenth edition of the Treatise on Vendors and Pur-

chasers, of the whole question of the validity of the defence as against a legal title, his Lordship, in discussing *Phillips* v. *Phillips*, and more particularly the observation of Lord Westbury, that the defence does not apply "where the Court exercises a legal jurisdic-"tion concurrently with Courts of Law," makes the following remark:—"It will be observed that the "decisions in *Williams* v. *Lambe* and *Collins* v. "*Archer* were not made on the ground now sug-"gested."

We have endeavoured to show to what extent there may be reason for inferring that the decision in *Collins* v. *Archer*, at least, was made on the ground suggested.

The ultimate result of the consideration of the two decisions of *Williams* v. *Lambe* and *Collins* v. *Archer*, seems to be, that they clearly are not sustainable on the ground of the defence of purchase for value without notice being unavailing against a legal title, and that the opposite views of Lord St. Leonards and Lord Westbury render it doubtful whether they can be supported on the ground of the application having been to the concurrent jurisdiction of the Court.

Having regard to the difference of opinion between two such great authorities, and to the absence of anything showing conclusively that Sir John Leach's decision was really founded on the circumstance of the invoked jurisdiction being concurrent, it may be permissible to point out that, if the true principle in such cases be (as contended for by Mr. Roper) that the Court of Equity is to afford the plaintiff the same

relief as, but no more than, could be obtained at law (for instance, as established by *Gomm* v. *Parrott* (*a*), no discovery), the natural course for the Court of Equity to take would seem to have been to say: we can certainly do no more for you against the purchaser for value than could the Common Law Courts, and so, instead of involving ourselves in repeated discussions, at various stages of the litigation, as to whether this thing or that thing is or not in excess of your remedies at law, we will leave you to assert your title in the Common Law Courts.

(*a*) 3 Common Bench, N. S. 47. See p. 25, ante.

CHAPTER II.

We proceed now to Lord Westbury's second class of cases, that of several purchasers or incumbrancers claiming in equity, of whom one who is later in time has succeeded in obtaining an outstanding legal estate, in which cases, Lord Westbury says, the principle is that a Court of Equity will not disarm a purchaser.

The first mention of this doctrine occurs three years earlier than the decision of *Bassett* v. *Nosworthy* (the leading case in respect to our first class), and the cradle of it may be said to be *Marsh* v. *Lee* (*a*), which was decided by Lord Keeper Bridgman, with the assistance of Lord Justice Hale (then Chief Baron) and Rainsford J., in the year 1670, and it was on that occasion, as it is believed, that Lord Hale made use of the expression so often since referred to of "*tabula in naufragio*."

The doctrine applies both to purchasers, in the ordinary popular sense of the word, and to mortgagees who are partial purchasers.

The most frequent occasions for its application are

(*a*) 2 Ventris, 337, s. c. 1 Cases in Chancery, 162.

the cases of, first, a mortgage, and then a sale suppressing the mortgage, or of several consecutive mortgages, some one or more of the earlier being concealed on the occasion of a later one being made.

The most familiar statement of the doctrine as applied to the particular instance of several mortgages, is to be found in *Brace* v. *Duchess of Marlborough* (*a*), decided by Sir Joseph Jekyll, who there laid down, "1st. That if a third mortgagee buys in the first "mortgage, though it be pending a bill brought by "the second mortgagee to redeem the first, yet the "third mortgagee having obtained the first mortgage, "and got the law on his side and equal equity, he "shall thereby squeeze out the second mortgagee; "and this the Lord Chief Justice Hale called a *plank* "gained by the third mortgagee, or *tabula in nau-* "*fragio*, which construction is in favour of a purchaser, "every mortgagee being such *pro tanto*.

* * * * *

"But, 6thly, his Honour said in all these cases it "must be intended that the *puisne* mortgagee, when "he lent his money, had no notice of the second "mortgage."

The case supposed here by Sir Joseph Jekyll is that of a *puisne* mortgagee getting in the first legal mortgage, but the doctrine applies equally wherever the purchaser or mortgagee, whose title is later in point of term, has acquired any legal estate, subject to the qualification which we shall presently find to exist in

(*a*) 2 Peere Williams, 491.

those cases in which the legal estate has been obtained, not from a mortgagee, but from a trustee.

In connection with this branch of the subject, let us first consider the distinction which exists between a first legal mortgagee and a person in whom a legal estate is vested as trustee.

A mortgagee is not trustee for his mortgagor, still less is a first mortgagee a trustee for a second mortgagee.

A second mortgagee may, if he think fit, give notice to the first mortgagee of his own mortgage, but that notice cannot in any way fetter the right of the first mortgagee to transfer his mortgage to any one, and as he may think fit. If this were not so, the rights of the first mortgagee, as existing immediately after taking his mortgage, would be diminished and prejudiced by the subsequent act of the mortgagor. It follows, therefore, that so long as the first mortgage is unsatisfied, so long may the first mortgagee transfer it to any one, and consequently to a third mortgagee, so as to enable the latter (if he had no notice of the second mortgage at the time of taking his own security) to squeeze out the second mortgagee (*a*).

There is one restriction only on this general right to transfer. The transfer cannot be made after a decree in a suit for foreclosure, or for otherwise determining the rights of the various incumbrancers (*b*). Nothing, however, short of a decree is sufficient to

(*a*) See Peacock *v.* Burt, 4 Law Journ. N. S. Chanc. 33; Bates *v.* Johnson, Johnson's Reports, 304, pp. 317, 318.

(*b*) Wortley *v.* Birkhead, 2 Vesey senior, 571.

restrict the right, not even a submission by a first mortgagee made by answer in a suit instituted against him by a second mortgagee, to assign his security on being paid the amount due to him (*a*).

Suppose, however, a mortgagee to have been paid everything that is due to him on his mortgage without reconveying, and without any bargain or undertaking on his part to transfer his security, what is his position? It is that of trustee for the mortgagor, or for the various incumbrancers according to their legal priorities. It differs to some extent from that of an express trustee, because the express trustee must know, or at least is presumed to know, the contents of the instrument declaring the trusts on which he holds; whereas the satisfied mortgagee may be only partially acquainted with the incumbrances executed by his mortgagor, and so far as he has no notice of them, cannot be affected with the duties of a trustee towards the unknown incumbrancers.

Subject to the foregoing qualification, a satisfied mortgagee may be treated for the purpose of the following discussion as a trustee.

Let us now consider the cases in which the later purchaser or incumbrancer has obtained the legal estate from a trustee.

Some of the old decisions seem, at one time, to have favoured the view that a *bonâ fide* purchaser for value who had no notice at the time when he paid his money, or gave his money's worth, was entitled to protect any

(*a*) Belchier *v.* Butler, 1 Eden, 523, 5 Tomline P. C. 292.

subsequently discovered infirmity in his title, per *fas aut nefas*, even by fraud or theft.

Thus, in *Huntington* v. *Greenville* (*a*), we find Lord Chancellor Nottingham referring to Sir John Fagg's case, "where he (Sir John Fagg), being a purchaser, "came into a man's study, and there laid hands on a "statute, that would have fallen on his estate, and put "it up in his pocket; and in that case, he having "thereby obtained an advantage at law, though so "unfairly and by so ill a practice, the Court would not "take that advantage from him."

It is clear that such a decision as that said to have been come to in Sir John Fagg's case could not be tolerated. No man could be allowed to reap a benefit from fraud or malpractice.

Accordingly, within only ten years after the reference made by Lord Nottingham to Fagg's case, we find it distinctly established that a purchaser for value without notice cannot even avail himself of a legal estate voluntarily conveyed to him where the conveyance is a positive known breach of trust on the part of both the conveying party and the purchaser for value.

The leading authority on this point is *Saunders* v. *Dehew* (*b*).

There, Ann Bayly, being possessed of a term of years, made a settlement under which her daughter Isabella took a life estate. Isabella made a mortgage, professing to be entitled to the property absolutely.

(*a*) 1 Vernon, 49. (*b*) 2 Vernon, 271.

Then the mortgagee, discovering that Isabella had no title, got an assignment of the term from the trustees, and filed a bill to foreclose, and it was held that the mortgagee could not avail herself of the legal estate thus acquired.

The Court said: "Though a purchaser may buy in "an incumbrance, or lay hold on any plank to protect "himself, yet he shall not protect himself by taking a "conveyance from a trustee after he had notice of the "trust; for by taking a conveyance with notice of the "trust he himself becomes the trustee, and must not, "to get a plank to save himself, be guilty of a breach "of trust."

If, then, a purchaser for value cannot protect himself by means of a legal estate obtained from a trustee in breach of trust, with full knowledge of both parties, the question is, when may he protect himself by means of a legal estate obtained from a trustee?

We propose examining in detail this question which seems to have been partially obscured by reason of the expressions used in its discussion in certain cases having been treated as applicable to others in which the circumstances were materially different.

And, first, it is to be noticed that in *Saunders* v. *Dehew*, which we have used by way of preface, so to speak, the legal estate was acquired by a transaction subsequent to and distinct from that upon the occasion of which the purchaser for value paid his money.

Before considering cases of that description, let us first consider those in which the legal estate is acquired as part of the very same transaction.

Now, when a trustee either upon express trust, or being a person in whom a legal estate is vested but not as an express trustee, concurs in a conveyance or mortgage by the alleged equitable owner to a purchaser or mortgagee, he may do so under the following four different states of circumstances:—

1. The trustee and the purchaser or mortgagee may both be aware of the trust, and the conveyance or mortgage may be made in defiance of this knowledge.
2. They may both be ignorant.
3. The trustee may know of the trust, and the purchaser or mortgagee may be ignorant.
4. The trustee may be ignorant, and the purchaser or mortgagee may have knowledge.

The first of these supposed states of circumstances gives rise, where the whole transaction is contemporaneous, to no room for discussion. The purchaser or mortgagee knew everything from the beginning, and is really not a purchaser without notice. *Willoughby* v. *Willoughby* (*a*), the case to which we owe the celebrated and elaborate judgment of Lord Hardwicke, was, in one of its main features, a case of the description first supposed.

The second state of circumstances, though almost impossible where the trustee holds upon an express trust, may well arise where the trustee is a person in whom, in consequence of a prior mortgage having been satisfied, a dry legal estate is vested without notice of

(*a*) 1 Term Reports, 763.

the true equitable title. It did, in fact, arise in the case of *Jones* v. *Powles* (*a*).

There one Jones, who was seised in fee, made, in 1800, a legal mortgage. This mortgage was paid off in 1808, but no reconveyance was taken, so that the legal estate was left outstanding. In 1814, Jones died. At his death, one Meredith took possession of the property, claiming under a will of Jones, which, though proved in the Ecclesiastical Court, was, in fact, forged. Shortly after Jones's death, Meredith borrowed money on the security of the property, and, on that occasion, the mortgagee of 1800, in whom the legal estate was outstanding, concurred in conveying to the new mortgagee. There were various further advances, transfers, and other transactions; some before, some after, notice that the will was a forgery; and it was held that as to all moneys paid by the defendant before notice, the defence of purchase for valuable consideration without notice must apply, and that the accounts must be taken as against the plaintiff, who claimed under the true title, on that footing.

The third state of circumstances, viz., that of the trustee who concurs in the conveyance or mortgage, having knowledge, while the purchaser or mortgagee is ignorant of the trust, implies, of course, positive fraud on the part of the trustee. In such a case it is clear that the purchaser or mortgagee is entitled to the protection of the legal estate thus acquired by him in innocence on his part. This is distinctly established

(*a*) 3 Mylne & Keen, 581.

by the recent decision of *Pilcher* v. *Rawlins* (*a*); we ought, perhaps, to say decisions, for there were two distinct fraudulent transactions, the circumstances of both of which fall under this our third head.

The facts of the first transaction were as follows:— A. B. mortgaged to three trustees (the trust being disclosed), of whom C. D. was the survivor. C. D., without consideration, fraudulently released to A. B., and then A. B., suppressing both mortgage and reconveyance, mortgaged to E. F. for value and without notice, and it was held that E. F. had priority.

In the second transaction there was, as in the first, a mortgage by A. B. to three trustees (the trust being disclosed), of whom C. D. was the survivor. Then A. B. executed to C. D. a purchase deed, which was in effect a sham, no money passing, and C. D. professing to be absolutely entitled under the sham deed, and having in fact the legal estate as surviving mortgagee, mortgaged to G. H. without notice of the first mortgage, and it was held that G. H. had priority.

It was argued in each case that the title to the legal estate being traceable only through deeds (in the first case the valid mortgage and fraudulent release, and in the second the valid mortgage alone) which disclosed the trust, the respective mortgagees E. F. and G. H. must be deemed to have had notice of the trust; but that view, though upheld by the Court of first instance, was considered untenable on appeal; and it being thus settled that E. F. and G. H., who were in fact

(*a*) L. R. 11 Eq. 53, 7 Ch. 259.

ignorant, were not affected by constructive notice, the result, as stated under our third head, followed as of course.

Here we may conveniently notice some observations of Lord Hardwicke in his judgment in *Willoughby* v. *Willoughby* (*a*), which seem to have been considered by Lord Eldon as presenting considerable difficulty; but which are, it is submitted, perfectly clear and consistent, if they are regarded as applied not to a case where the legal estate is got in by a transaction subsequent to that on the occasion of which the money was paid; but (as was the case in *Willoughby* v. *Willoughby*) as part of the original transaction.

Lord Hardwicke, after referring to the position of trustees to preserve contingent remainders, says: "It is "just the same here. If the *puisne* purchaser or "mortgagee has notice of the prior purchase or in- "cumbrance, he shall not avail himself of the assign- "ment of the term (*b*), but shall be decreed to "reconvey or procure it to be reconveyed. If he has *no* "*notice* he must retain it; but if the trustee who "joined in the assignment had notice of such prior "purchase or incumbrance, his conscience was affected "by the trust, it was a breach of trust in him; and "he ought to be decreed to make satisfaction. This "is in my opinion what equity would demand."

In reference to these words (for it is assumed that to

(*a*) 1 Term Reports, 763; see page 771.

(*b*) In the particular instance before Lord Hardwicke, the legal estate of which the person who alleged himself (but was held not to be) a purchaser for value without notice claimed the benefit, was a term of years.

them reference was intended to be made), we find Lord Eldon saying (*a*): "One of the greatest difficulties I "met with in deciding the case of *Maundrell* v. "*Maundrell*, was Lord Hardwicke's expression, that "the purchaser would be safe in taking the assign- "ment, if he could get it; but his Lordship would "not say the trustee would be safe. Surely if the "purchaser would be safe the trustee ought to "be so."

Unless there be some misconception on the part of the present writer as to the particular observations of Lord Hardwicke to which reference was intended to be made, it is submitted that the whole difficulty arises from treating them as having been made in respect to the operation of getting in a legal estate from a trustee, by a transaction separate and distinct from the original purchase or mortgage, instead of to a case where the legal estate is obtained as part of the original transaction.

The fourth state of circumstances does not, so far as the writer is aware, occur in any reported case; but it seems clear upon principle that the purchaser or mortgagee could in no sense be a purchaser for value without notice, and could not therefore be protected by any legal estate so acquired.

We pass now to the consideration of the cases in which the legal estate is acquired from the trustee by a transaction subsequent to and distinct from that of the original purchase or mortgage.

(*a*) Ex parte Knott, 11 Vesey, 609, see p. 613; and see observations of Lord Hatherley in Carter *v.* Carter, 3 Kay & Johnson, 617, at p. 640.

Here, again, we may have the same four states of circumstances as those mentioned in reference to the contemporaneous acquisition of the legal estate (*a*).

The first, where both trustee and purchaser or mortgagee knew of the trust, is the case of *Saunders* v. *Dehew* (*b*), mentioned at the outset, and no advantage is acquired by the purchaser for value.

The second and third states of circumstances might possibly occur in respect to a transaction by which a legal estate is acquired subsequently to the original purchase or mortgage, and if they should so occur, then, upon all principle, the result must be the same as where the legal estate is acquired under the original transaction; but of course, if it be supposed that the subsequent transaction takes place after discovery by the purchaser or mortgagee of the faultiness of his own title, and of the fact that the true equitable title lies elsewhere, these second and third states of circumstances fail to exist, and may be discarded from our consideration.

This brings us to the fourth state of circumstances in which the trustee is supposed to be ignorant (say is the legal representative of a former satisfied mortgagee who knows nothing of the subsequent equitable title), while the purchaser or mortgagee has discovered the infirmity of his own title, and is aware of the existence of a prior equitable title in some one else.

The distinction between this case and that where the fourth state of circumstances occurs in connection

(*a*) See page 37, ante. (*b*) 1 Vernon, 49.

with a conveyance from the trustee, as part of the original purchase or mortgage transaction, is obvious. In the latter, the purchaser or mortgagee parted with his money with knowledge that the person conveying the legal estate was trustee for some one else. He is, as already stated, in no sense a *bonâ fide* purchaser for value without notice.

In the former case he does undoubtedly fill that character, and the only question is, whether he is at liberty to avail himself of the ignorance of the trustee to protect the original transaction, which was in every respect *bonâ fide*.

The head and front of his offending consists only in concealing from the trustee facts which, if disclosed, would show the trustee that he ought to convey not to the purchaser, but to some other person.

Does this concealment vitiate the transaction? It is conceived not. In the eye of a Court of Equity the purchaser is, in a certain sense, considered to have an equal equity with the claimant prior in time. The trustee conveying as he does, in ignorance of the true title of which he has no notice, violates no duty, and incurs no liability; and the purchaser or mortgagee acquires and holds the legal estate as a plank in shipwreck.

This view is supported by the judgment of Lord Hatherley, when Vice-Chancellor, in *Carter* v. *Carter* (*a*), who after referring to *Saunders* v. *Dehew*, there says, that the authorities he had found on the subject

(*a*) 3 Kay & Johnson, 617, see p. 642.

resulted in this distinction, "that although you may "get in any outstanding legal estate which a person "may *bonâ fide* assign to you, you having notice of "the intervening incumbrance, *he not having any such* "*notice*, you cannot procure a conveyance from a "trustee who himself has an adverse duty to per- "form, and who, by such conveyance, would in fact "be making over the estate to you to protect you "against the very interests which it was his duty to "protect."

The conclusion arrived at is, however, not free from difficulty, and we find Lord Justice James thus expressing himself on the subject in a recent judgment: "But those cases where the person seeking the "conveyance, knew the fact that the trustee was "trustee for somebody else, and could not convey "without a breach of trust, whilst the trustee was "left in ignorance; those cases, I say, involve a "principle I have never been able to understand" (*a*).

We will now consider two material distinctions between Lord Westbury's second class of cases and the first class.

First.—Under the first class, as we have seen, the person setting up the defence has, as a rule, no legal title, and often no title at all; whereas, under the second, the defence is available only where the mortgagee or purchaser setting it up has actually obtained a legal estate. By the seventh resolution in *Brace* v. *Duchess of Marlborough* (*b*), the law on the subject is

(*a*) Pilcher *v.* Rawlins, L. R. 7 Ch. 260, see p. 268.
(*b*) 2 Peere Williams, 491, see p. 496.

thus laid down:—"In this case it appeared that a "*puisne* incumbrancer bought in a prior mortgage in "order to unite the same to the *puisne* incumbrance, "but it being proved that there was a mortgage prior "to that, the Court clearly held that the *puisne* in- "cumbrancer, where he had not got the legal estate, "or where the legal estate was vested in a trustee, "could there make no advantage of his mortgage, but "in all cases where the legal estate is standing out, "the several incumbrances must be paid according to "their priority in point of time; *qui prior est in tempore* "*potior est in jure.*"

The foregoing statement of law, was adopted by Lord Hardwicke in *Willoughby* v. *Willoughby* (*a*), where he says: "Wherever the legal estate is standing out, "either in a prior incumbrancer, or in such a trustee "as against whom the *puisne* incumbrancer has not the "best right to call for the legal estate, the whole title "and consideration is in equity, and then the general "maxim is '*qui prior est tempore potior est jure.*'"

This doctrine received a strong application in the case of *Rooper* v. *Harrison* (*b*), decided by Lord Hatherley when Vice-Chancellor, in which a first mortgage with power of sale, and a third mortgage taken without notice of a second, became both vested in the same person, and that person having sold the mortgaged property under the power, it was held that there being no longer any legal estate vested in the third mortgagee, the surplus proceeds of sale, after satisfying the

(*a*) 1 Term Reports, 763; see p. 773.
(*b*) 2 Kay & Johnson, 86.

first mortgage, could not be retained in satisfaction of the third mortgage, but must go to the second mortgagee.

There Lord Hatherley, after explaining in detail (*a*) how the legal estate acquired by a subsequent incumbrancer is made available as a *tabula in naufragio*, concludes by saying, "All that is a very peculiar part "of this doctrine, but the Court has never gone "beyond this; and if it does not find the legal estate "interposed, it deals with the money according to "the priorities."

Finally, the doctrine was made by Lord Westbury the foundation of his decision in *Phillips* v. *Phillips* (*b*), in which he held that a purchaser for valuable consideration (marriage in the particular instance) without notice of a previously granted annuity, could not, the whole legal estate being outstanding in previous incumbrancers, and the interest of the annuitant and the purchaser being alike equitable, rely effectually on the defence of purchase for value without notice against a bill by the annuitant to enforce payment of his annuity.

This portion of the decision was, equally with that which relates to *Williams* v. *Lambe* and *Collins* v. *Archer* (*c*), dissented from by Lord St. Leonards on the ground that the question in *Phillips* v. *Phillips* was not one of settling priorities, but of affording relief in a contest between adverse equitable claimants (*d*).

(*a*) 2 Kay & Johnson, 108, 109.
(*b*) 4 De Gex, Fisher & Jones, 208.
(*c*) See pp. 28, 29, ante.
(*d*) See Vendors & Purchasers, 14th Ed. 797.

In reference to a difference of view between such great authorities, perhaps we ought to say "*non* "*nostrum &c.;*" but to the writer it seems that the suit was virtually one to adjust the rights over the property in question of persons claiming in equity only, and that the doctrine "*qui prior est tempore, &c.,*" was correctly applied.

This much seems clear, that if the prior legal incumbrancers had filed a foreclosure bill, a right of redemption must have been given to the annuitant in priority to that given to the subsequent purchaser.

Secondly.—Lord Westbury's observation in reference to this second class (*a*), where he says that the principle is, that a Court of Equity "*will not disarm a* "*purchaser,*" falls considerably short of a full statement of what equity does for a purchaser; for in cases under the second class, equity not only does not disarm him, but actually gives him priority and precedence by reason of the legal estate which he has acquired.

The Court does not, as in cases arising under the first class, simply say to the plaintiff, "we dismiss your "bill, we will give you no assistance against the pur- "chaser for value without notice," but it marshals the rights and administers the property which is the subject of litigation on the footing of the purchaser or mortgagee who has acquired the legal interest having actually the first claim.

(*a*) Phillips *v.* Phillips, 4 De Gex, Fisher & Jones, 208, see pp. 217, 218.

This difference, of course, is attributable to the different natures of the suits.

In cases arising under the first class, the plaintiff says: "I want assistance." The Court says: "We "cannot give it as against a purchaser for value with- "out notice; you must make what you can of your "legal right without our assistance."

In the second class of cases, there are various equities attaching to the property under litigation, and the Court could not stay its hand altogether without leaving everything in hopeless confusion, and doing absolute injustice.

This distinction between the two classes of cases is well illustrated by the case of *Finch* v. *Shaw* (*a*), decided by Lord Romilly; and on appeal in the House of Lords (*b*).

The facts material for our purpose are very short.

A first legal mortgagee filed a bill against a second mortgagee for foreclosure. Amongst other defences the second mortgagee set up that of his being a purchaser for value without notice.

The argument in support of the defence was somewhat singular. It had been settled, as we have seen in our discussion (*c*) of *Williams* v. *Lambe* and *Collins* v. *Archer*, that the defence is a good defence, although a plaintiff may come into equity relying on a legal title; and the contention now was that in all cases

(*a*) 19 Beavan, 500.
(*b*) Colyer *v.* Finch, 5 House of Lords Cases, 905.
(*c*) See pp. 17—22, ante.

where the plaintiff came into equity relying on a legal title the defence was a valid defence, and the plaintiff could have no relief in equity; or in effect that the simple circumstance of the title of the plaintiff being legal, was sufficient to prevent the Court from giving him any relief against a purchaser for value without notice.

It was urged that by the decisions, and more particularly that of Lord Romilly himself in *Attorney-General* v. *Wilkins* (*a*), the mortgagee, his title being a legal title, must be left to his remedies at law.

Lord Romilly, in his judgment, after reiterating his view that the defence of purchase for value without notice, applied as against a legal right as well as an equitable right, proceeded to discuss the applicability of the defence to cases of mortgage, and continued thus (*b*):—

"In this case, suppose the legal estate was out-
"standing, and that the question was between two
"equitable incumbrancers, both of whom had ad-
"vanced their money without any notice of any
"incumbrance on the estate, and therefore exactly
"under the same conditions; if the conduct of the
"parties were the same, I should give priority to the
"one who advanced his money prior in point of time.
"Then could the rights and situation of the first
"mortgagee be in the least diminished or injured if
"he had, in addition, obtained the legal estate, or is
"the doctrine of a purchaser for valuable consideration

(*a*) 17 Beavan, 285. (*b*) 19 Beavan, 508.

" without notice applicable to that state of things? " In my opinion it is not."

Then, after referring to *Williams* v. *Lambe* and *Collins* v. *Archer*, in terms which impliedly treat them as well decided, Lord Romilly continues thus :—

" The distinction, I apprehend, is this : if the suit " be for the enforcement of a legal claim or the " establishment of a legal right, then, although this " Court may have jurisdiction in the matter, it will " not interfere against a purchaser for valuable con- " sideration without notice, but leave the parties to " law ; if, on the other hand, the legal title is perfectly " clear, and attached to that legal title there is an " equitable remedy or an equitable right which can " only be enforced in this Court, I have not found any " case, nor am I aware of any, where this Court will " refuse to enforce the equitable remedy which is " incident to the legal right (*a*)."

Further on Lord Romilly points out that although at that moment the plaintiff (Colyer) was unable to bring ejectment by reason of the existence of a prior term securing an annuity, that term might cease at any time, and then upon the plaintiff recovering the

(*a*) This passage seems to have been intended to suggest a ground on which the decisions in *Williams* v. *Lambe* and *Collins* v. *Archer* might be supported, and at the same time might in their turn serve to strengthen the decision subsequently arrived at in the principal case. If so, Lord Romilly here regards the right of foreclosure as an equitable right attached to the legal estate in the mortgagee. It is submitted that it would be more correct to view it as a right, correlative to that of redemption, imported, equally with the latter, into the mortgage contract by Courts of Equity, and to consider the legal estate as an adjunct to the equitable right.

estate, a bill might be filed against him for redemption, and says: "If I am not to interfere to grant fore- "closure to Mr. *Finch*, am I to interfere to grant re- "demption to Mr. *Colyer?* * * * * "It appears to me impossible for any Court to come "to such a conclusion."

Accordingly Lord Romilly made the usual decree for foreclosure (*a*).

On appeal to the House of Lords (*b*), the decision at the Rolls was upheld. Lord Cranworth (Lord Chancellor), in moving the judgment of the House, after stating his agreement in the doctrine "that "the principle on which the Court protects a pur- "chaser for valuable consideration without notice, is "not confined to the case of a purchaser for valuable "consideration who has got the legal estate," said: "But I think that that doctrine cannot by possibility "apply to the case of a Bill of foreclosure, and there "are reasons for so holding pointed out by the "*Master of the Rolls* in his judgment, reasons which "are no doubt perfectly satisfactory, but I should "proceed on a much shorter ground. For the "purpose of the question whether the Court would "interfere against a purchaser for valuable considera- "tion without notice, a foreclosure is not relief at "all. The mortgagee who seeks foreclosure stands "in such a position to the mortgagor, or the purchaser "from the mortgagor for valuable consideration with-

(*a*) See Heath *v.* Crealock, L. R. 10 Ch. 22, which decision must be considered as founded on the same principle as Finch *v.* Shaw.

(*b*) Colyer *v.* Finch, 5 House of Lords Cases, 905; see p. 921.

" out notice, that that purchaser can at any time file a " bill to redeem the mortgage; and, that being so, it " would be most unjust if there was not a correlative " right on the part of the mortgagee to say, '*you shall* " *redeem now, or you shall never redeem.*'"

Lord Cranworth does not advert to the circumstance, that after the conclusion is reached that the defence cannot be set up as a complete bar to a foreclosure suit, the question whether a purchaser for value has or has not a legal estate, becomes all important; but this is accounted for by the fact that, in the particular case before him, the legal estate was in the plaintiff.

The substance of the decision is, it is conceived, this: that by the effect of the mortgage certain equitable rights and liabilities were created which a Court of Equity could not, without injustice, refuse to recognise and adjust; and that the fact of the plaintiff having the legal estate could afford no just ground for refusing to adjust the equitable rights.

CHAPTER III.

We now come to Lord Westbury's third class of cases, which he describes as those in which there are circumstances that give rise to an equity as distinguished from an equitable estate, as, for example, an equity to set aside a deed for fraud or mistake.

In these cases the rule of the Court of Equity is, it is conceived, this: that it will not exercise its special jurisdiction to remedy fraud or mistake to the prejudice of a purchaser for value.

In this third class of cases the defence applies equally, whether the purchaser has only an equitable or a legal estate.

It is not meant by this that his position is as strong in the former case as in the latter, because the absence of a legal estate may cripple his power of defending himself at law; what is meant is, that the possession by him of a legal interest is not needed, as in the second class, to make the defence available.

We may take, as an instance of the third class, *Bowen* v. *Evans* (*a*), decided by Lord St. Leonards, when Lord Chancellor of Ireland.

(*a*) 1 Jones & Latouche, 178; see pp. 263, 264.

The facts there were very complicated, but the case may be represented generally as being one of a bill filed by a remainderman in tail to set aside a sale of the settled estate by the tenant for life as having been effected by fraud. Amongst the defendants to the suit were certain persons claiming, as purchasers for value without notice, equitable interests only. In reference to these defendants, Lord St. Leonards thus expressed himself:—

"It appears that Mr. G. E. Bruce" (the original purchaser) "granted, by way of settlement for valuable "consideration, a rent-charge secured by a term to be "issuing out of this property before he obtained a "conveyance of the legal estate; and it was insisted "that the purchaser, having no notice of the fraud, "had an estate which ought not to be impeached in "this Court. It was not denied that, he being a "purchaser for value without notice, though of an "equitable interest only, the bill must be dismissed "as against him, with costs; and though there is a "difference of opinion on the point whether a pur-"chaser of an equity without notice can protect him-"self in this Court as a defendant against the legal "title (*a*), yet, in my opinion, whether the purchaser "has the legal estate, or only an equitable interest, he "may, by way of defence, avail himself of the charac-"ter of a purchaser without notice, and is entitled to "have the bill dismissed against him, though the next "hour he may be turned out of possession by the legal "title."

(*a*) This refers to the question discussed at pp. 18–22, ante.

Amongst older cases establishing the same doctrine, though without any special reference therein to the question whether the purchaser's estate was legal or equitable, we may cite *Malden* v. *Menill* (*a*), in which it was held by Lord Hardwicke that where a *bonâ fide* purchaser for value without notice is concerned, equity will not interfere to grant relief in favour of a party, though he has acted in ignorance of his title upon a mistake of law.

So, again, in *Bell* v. *Cundall* (*b*), which was a bill to rectify a mistake in the body of a common recovery of a copyhold estate, the name of the vouchee having been inserted instead of the name of the tenant, and so *vice versâ;* and in which the fact of mistake was apparent from a memorandum in the margin of the record in the handwriting of the steward of the manor, in which the names of the parties were correctly given; there, upon its appearing that the remainderman had, upon the foot of the mistake in the recovery, got possession of the estate, and sold it for valuable consideration, Lord Hardwicke declined to give any relief.

To this same class of cases must also, as it is considered, be referred that of *Penny* v. *Watts* (*c*), as decided in the Court of first instance.

The object of the bill in that case was to establish and obtain performance of an agreement by which, in consideration of a niece giving up a legacy of £2,000, to which she was entitled under her uncle's will, the uncle's widow engaged to convey certain lands to her.

(*a*) 2 Atkyns, 8. (*b*) Ambler, 102.
(*c*) 2 De Gex & Smale, 501.

To this bill the defence of purchase for valuable consideration without notice was set up by the widow's second husband, claiming under an ante-nuptial settlement made on the occasion of the second marriage.

The legal estate in the land, or some portion of the land, to which the litigation related, was outstanding in a mortgagee, and it was contended that in consequence the defence was not available; but Vice-Chancellor Knight Bruce held that the defence was available, notwithstanding the legal estate might not have been acquired under the settlement.

The case was appealed, and on appeal (*a*), Lord Cottenham thought there was sufficient evidence of constructive notice of the agreement to warrant the direction by him that certain issues should be tried. Ultimately the case was compromised; but the decision of Vice-Chancellor Knight Bruce on the point of law remains.

The reported cases falling within the third class are not numerous, and the distinction between the cases where the plaintiff comes to enforce an equity and those where he comes founding himself on an equitable estate may occasionally be somewhat thin.

Take as an example a suit for specific performance.

A., let us suppose, sells land to B., and then sells the same land to C. without notice, and then B. takes proceedings against A. and C. to enforce his contract, whereupon C. pleads that he is purchaser for value without notice.

(*a*) 1 Macn. & Gor. 150.

Now, according to one familiar mode of stating the relation between A. and B., A. became, after the sale to B., a trustee for B., and it may be said that B. comes to the Court founding himself upon his equitable estate. The other view would be, that he comes relying on an equity rather than an equitable estate.

The distinction is immaterial, assuming C. to have taken his conveyance, and obtained thereby the legal estate without notice, because, then, even adopting the first view, the case is simply that of a purchaser who, simultaneously with the payment of his purchase-money, has obtained from a trustee a conveyance made by the latter in breach of trust on his part, but with perfect innocence on the part of the purchaser (*a*).

Suppose, however, that C. has paid his purchase-money and obtained a conveyance which does not carry with it the legal estate. Will the defence protect C. who has an equitable title only?

It is conceived that it ought, more especially as the jurisdiction in specific performance is one which the Court of Chancery has often declined to exercise in cases where a decree would entail hardship.

(*a*) See p. 38, ante.

CHAPTER IV.

HAVING now examined the three classes of cases mentioned by Lord Westbury to which the defence applies, we will endeavour to extract from them some rule or principle.

The first observation that occurs is, that Classes I. and III., though differing in certain respects, are more akin to one another than is either to Class II.

In Class I. the Court of Equity was asked to give to the owner of a legal interest some equitable remedy or assistance not obtainable at law, and the answer was :—" Against a purchaser for value without notice " we will give no assistance." In Class III. the Court was asked to exercise some exceptional head of equity jurisdiction founded on fraud, accident, or mistake, and the Court declined to exercise it. In both classes of cases the mode in which the Court gave effect to the defence was by simply declining to exercise any jurisdiction whatever—in other words, by dismissing the bill.

In Class II., on the other hand, the Court did not decline to exercise jurisdiction, but, while exercising it, contrived to give the purchaser for value the benefit of any legal advantage he had acquired.

We have already indicated (*a*) what we conceive to be the true ground for the different course of action adopted by the Court in these different cases.

Where, for instance, property is mortgaged to (say) A., B., C., and D., in succession, and one or more of the later mortgagees fills the character of a purchaser for value without notice, the Court cannot say: "We "will do nothing; settle your disputes at law," for this would be equivalent to holding that the various rights and equities in respect to foreclosure and redemption should be disregarded altogether. The first legal mortgagee would recover possession and hold the property absolutely.

In other words, the case is one in which the Court must, in order to avoid chaos, exercise its jurisdiction, and the only question is, on what terms as respects the purchaser for value it shall be exercised.

The different mode of action adopted by the Court in reference to these classes of cases suggests that the true primary division of our subject lies between the cases in which the Court declines altogether to exercise jurisdiction and those in which it does not so decline.

If we can define the latter, the next step will be to distinguish between the cases in which the Court, though exercising jurisdiction, accords some advantage to the purchaser for value without notice and those in which it does nothing for him.

Now, it is submitted that the question, whether the

(*a*) See p. 48.

Court is to exercise or to decline jurisdiction depends, not upon whether the plaintiff comes claiming under a legal or an equitable title, nor, indeed, upon the nature of the title set up by the purchaser for value, but on the nature of the suit.

If the suit is, as in those falling under Classes I. and III., of such a description that the matter can be conveniently disposed of by simply declining all action whatever, that course will be adopted, but if, on the other hand, the suit be one for the determination and adjustment of equitable rights and estates in reference to property, and the effect of the Court doing nothing would be to leave these rights and estates undetermined and unadjusted, the Court will not decline jurisdiction.

Thus in the cases, adverted to in the outset (*a*), in which there is a fund to be administered, in the cases falling under Class II. already discussed, and in many others, the Court cannot properly decline jurisdiction.

We have next to distinguish the cases in which the assumption of jurisdiction by the Court results in rendering the defence of purchase for value without notice wholly unavailing, and those in which, although jurisdiction is assumed, it is exercised in such a way as to give the purchaser the benefit of the defence.

Under the former head will fall all those cases in which the Court is distributing or administering a fund, and those also in which the whole legal estate being outstanding, and the estates and interests to be

(*a*) See p. 4, ante.

determined and adjusted being all purely equitable, the maxim "*qui prior est tempore, potior est jure*" governs the right (*a*).

Under the latter will fall those cases already considered under Class II., in which the purchaser for value has obtained the protection of a legal estate; and the same principle must, it is conceived, be applied to other suits enforcing equitable rights.

To illustrate our view of the action of the Court and of the applicability of the defence in a case not falling within either the first or the third class, let us suppose that the head of jurisdiction which the Court of Equity was requested to exercise was that of "*Partition.*"

In such a case, the Court could not properly decline jurisdiction without leaving the rights of the various tenants in common undetermined and unadjusted, and saying in effect that they should remain tenants in common, although the law had made provision for their release from that undesirable condition. The Court must, therefore, it is conceived, have assumed jurisdiction, notwithstanding that the defence of purchase for value without notice might be set up by a defendant.

Next let us consider the effect and result of the Court assuming jurisdiction.

We will suppose for this purpose that the bill was by a person claiming three-fourths of the property, and, first, let it be assumed that the whole legal estate was outstanding in some trustee or paramount mortgagee. In such a case it would have been of no avail

(*a*) See pp. 44–47, ante.

for one of the defendants to say, "I am purchaser "for value without notice of the whole property, "and, therefore, you are entitled to no decree." Nor would it have been of any use to say, "I purchased "one moiety for value without notice, and you, the "plaintiff, can have a decree for partition only on the "footing of your being entitled to one-half instead "of three-fourths." The answer would be:—"The "interests are all equitable, and you, the purchaser "for value, have, after all, no higher right than the "plaintiff."

If, however, the purchaser for value should have had vested in himself, or in some person expressly a trustee for himself, a legal title co-extensive with the equitable share or interest purchased by him, and larger than was compatible with the right or title asserted by the plaintiff, then, to that extent, his right must have prevailed, for the Court would not deprive him of any legal estate.

Of course, if the purchaser for value without notice had purchased and obtained the legal estate in the entirety, the result would be simple dismissal of the bill for partition, though not on the ground of the Court refusing to assume jurisdiction against the purchaser, but because, after assuming it, that form of decree would alone meet the exigency of the case.

If the purchaser for value without notice had purchased and obtained the legal estate in a moiety, then the plaintiff could have a decree for partition only on the footing of his being entitled to one-half of the property instead of three-fourths as claimed by him.

To sum up: the defence was an absolute bar where a Court of Equity was asked to afford assistance to the legal title by the exercise of some special kind of jurisdiction, such as discovery, removal of terms, &c., or where it was asked to exercise some special head of jurisdiction, such as those founded on fraud, accident, or mistake, but it was no such bar where the Court was merely asked to adjust the equitable rights of the plaintiff and others in the exercise of some head of ordinary jurisdiction, the exercise of which it could not have declined without leaving those rights unsettled and in confusion; but in the latter case, while assuming and exercising jurisdiction, it gave to any purchaser for value who might have acquired a legal estate, the full benefit of that legal estate, as an adjunct to his equitable right.

The foregoing is the nearest approach we have been able to make to the enunciation of any general rule or principle governing the defence.

It may be convenient before considering the applicability of the defence to litigation arising since the passing of the Judicature Acts, 1873 and 1875, to say a few words as to the meaning of the expressions, "*valuable consideration*" and "*without notice;*" but we shall be brief under these heads, because the primary object of this sketch is rather to show the circumstances under which the defence applies, assuming the defendant who is setting it up to be a purchaser for valuable consideration without notice, than to explain what constitutes such a purchaser.

As respects the meaning of the expression, "*valu-*

"able consideration," the rule is the same as that which obtains in respect to cases arising under the 27 Elizabeth, cap. 4.

Of course, money or money's worth is a valuable consideration, and so is marriage (a); so also any liability undertaken by the person acquiring the property.

And just as it has been held under the statute of Elizabeth, that if there be in fact a valuable consideration, the Court will not inquire into the quantum or amount (b); so it has been held with respect to this defence.

This was, in truth, one of the points decided in *Bassett* v. *Nosworthy*, in which Lord Nottingham, after alluding to the argument raised before him that the lands had been proved to have been of much greater value than the purchase-money paid, expressed himself thus (c):—

"That will not alter the case, because in purchases "the question is not whether the consideration be "adequate, but whether it be valuable; for if it be such "a consideration as will make a defendant a purchaser within the Stat. Elizabeth (d), and bring him "within the protection of that law, he ought not to "be impeached in equity."

On the other hand, it is perfectly clear that the

(a) [illegible] Simmons [illegible]

(b) [illegible]

(c) [illegible]

(d) [illegible]

consideration must be valuable in the technical sense of the word, and that a merely good consideration, as natural love and affection, would not sustain the defence.

Next, as to the words, "*without notice.*"

The question, what is "notice?" is a very large one. It embraces questions arising upon the County Registry Acts, upon the Statute Law applicable to British ships, upon the complicated legislation affecting judgments and pending suits, and upon a variety of other matters not cognate to the immediate object of this sketch. It branches out into the question of actual notice to the purchaser himself, which may be regarded as the exception, and notice to his solicitor or agent, which is far more common—which last, if acquired by the solicitor or agent in the same transaction, is equivalent to notice to the principal. It passes thence to the difficult question, how far, and to what extent, knowledge of the solicitor acquired before his retainer by the client is to be imputed to the client so as to affect him with constructive notice? (*a*). It involves the question, how far knowledge or notice of facts which suggest the propriety of inquiry is, by putting the purchaser upon inquiry, to be deemed notice of what the purchaser, who fails to inquire, would have learnt if he had inquired? It involves the question of the absolute duty of the purchaser to make inquiry for the title deeds, and the consideration of what answer accounting for their

(*a*) Fuller *v.* Bennet, 2 Hare, 394.

non-production may be accepted as reasonably satisfactory.

To do justice to these various topics would require time and space at least equal to that already allotted to the immediate object of our sketch, and it is not proposed to discuss them here.

CHAPTER V.

It remains that we should say a few words in reference to the applicability of the defence to litigation arising in the Supreme Court, and for that purpose we will state somewhat more fully the enactments of the Judicature Act, 1873, to which we adverted at the commencement of our sketch.

The 24th section of the Judicature Act, 1873, enacts by sub-section (2) that if any defendant * * * * alleges any ground of equitable defence to any claim of the plaintiff * * * * the Courts and every judge thereof shall give to * * * * every equitable defence so alleged the same effect by way of defence against the claim of the plaintiff as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that Court *for the same or the like purpose* before the passing of the Act.

The 25th section of the Act enacts by sub-section (11) as follows:—"Generally in all matters not herein-" before particularly mentioned, in which there is any " conflict or variance between the Rules of Equity and " the Rules of the Common Law *with reference to the* " *same matter*, the Rules of Equity shall prevail."

Now, in reference to the enactment of section 24, sub-section (2), it should be premised that, according to the more natural construction of the words used (though they may be capable of a larger one), the rule embodied in that sub-section confers a right of equitable defence only in cases in which the action brought in the Supreme Court is for some purpose, the same as or like to one for which before the Act a suit might have been instituted in the Court of Chancery; and it is conceived that it would not be legitimate in construing the rule first to assume the possibility of a suit in Chancery for the particular purpose, and then to consider what equitable defence might have been set up in that suit.

For instance, a damage cause in respect of collision at sea, seeking to enforce a maritime lien on the ship causing collision, could not before the Act have been instituted in the Court of Chancery, but only in the Admiralty Court, or in a County Court having Admiralty jurisdiction; hence to such a suit in the Supreme Court the defence of purchase for value without notice could not, according to our construction of the sub-section, be validly set up.

If this were otherwise, a most important alteration would have been introduced into maritime law, it being clearly established by that law (however widely such a result may differ from equity principles) that a purchaser of a ship for valuable consideration and without notice of the maritime lien, takes it subject to that lien (*a*); and it seems a more reasonable expo-

(*a*) The Bold Buccleuch, 7 Moore, P. C. C. 267; The Europa, 32 L. J. (N. S.) P. M. & A. 188.

sition of the rule to regard it as intended to preserve as nearly as may be the benefit of the defence, and not as introducing indirectly large and important alterations in the law.

Starting, then, from the general principle that the defence applies only where a suit for the same or the like purpose might have been brought in the Court of Chancery, let us consider some of the various kinds of actions that may occur.

As respects actions brought in the High Court of Justice with a view to obtain relief of the description embraced by either the second or the third classes of cases which we have discussed, there would seem to be no difficulty in applying the enactment of the Judicature Act. Such actions will, in point of fact, be almost invariably brought in the Chancery Division of the High Court; but even if such an action be brought in a Common Law Division, and retained there (by reason of the power of transfer not being exercised), still the construction of section 24, subsection (2), of the Judicature Act seems free from doubt.

The question is, Could such an action as that which has in fact been brought have been, before the passing of the Act, brought in the Court of Chancery *for the same or the like purpose?* and upon this question being answered in the affirmative, the same effect must be given to the defence as the Court of Chancery would have given to it.

On the other hand, to the large number of actions relating to matters in respect to which no suit could

have been brought in Chancery before the Act, the defence will, it is conceived, not apply.

Thus, for instance, chattels belonging to A. are stolen, and are purchased by B. for valuable consideration without notice, but not in market overt, and A. brings an action against B. to recover his property. In such a case the defence has, it is conceived, no application—or, at all events, no application as a defence to the whole action—unless, perhaps, the chattels were of such a description that no damages could compensate A. for their loss, in which last case a bill in Chancery to have them delivered up might have been sustained (*a*).

A doubt suggests itself, however, whether the defence, though not a defence to the whole action, may not be held valid to the extent of conferring upon a defendant who, in such an action, is called upon to answer interrogatories a right to say, "I am "a purchaser for value without notice, and I decline "to answer."

It is clear that, if we go back to the time when litigants in the Common Law Courts were dependent on the Court of Chancery for discovery, the defence would have been an answer to a bill for discovery in aid of an ordinary Common Law action.

Thus in *Hoare* v. *Parker* (*b*), which was a bill for discovery against a pawnbroker in aid of proceedings at law to recover plate which had been pledged by a

(*a*) See Pusey *v.* Pusey, 1 Vernon, 273 ; Duke of Somerset *v.* Cookson, 3 Peere Williams, 390.

(*b*) 1 Brown's Chancery Cases, 578.

person who had only a life interest therein, and had since died, the defendant pleaded purchase for valuable consideration without notice. The plea was overruled as being insufficient in form; but Lord Thurlow considered the defence, if sufficiently pleaded, a good defence, saying: "A purchaser without notice, "and for a valuable consideration, is not bound "in conscience to assist the right owner in the "legal recovery of the subject purchased under such "circumstances."

It is also clear that in the exercise of the special powers of compelling discovery conferred upon the Common Law Courts by the Common Law Procedure Act of 1854, the right to discovery, even when the whole of the proceedings were at Common Law, might be excluded by the defence of purchase for value without notice. This is illustrated by the case of *Gomm* v. *Parrott* (*a*), which we have already discussed (*b*) in connection with *Williams* v. *Lambe*.

The Common Law Procedure Act of 1854, however, in terms made the right to discovery at Common Law co-extensive only with that in Equity; and the question is whether, under the Judicature Act, 1873, which contains no such express limitation of right, the result is or not the same.

If the preservation of the "*status quo ante*" is to be regarded as the key to the construction of Section 24, sub-section (2), the answer to this question must, it is conceived, be in the affirmative.

(*a*) 3 Common Bench Reports, N. S. 47. (*b*) Page 25, ante.

The words of that sub-section may, without unduly straining them, be made applicable by regarding the action brought as consisting of two distinct claims (that is to say)—a claim to the chattels, and a claim to have discovery respecting them.

For the first of these purposes, a suit could not have been brought in the Court of Chancery before the passing of the Act, but for the latter it might, and to the extent of the latter purpose the defence therefore may be held to apply.

From the class of actions last considered, representing what before the Judicature Acts would have been ordinary Common Law actions, we must, it is conceived, carefully distinguish actions which, although wearing the general aspect of Common Law actions, are in effect brought to obtain by means of the improved procedure of the Supreme Court, what before the Judicature Acts could have been obtained only by means of the Court of Chancery.

To such actions the defence, it is conceived, clearly applies.

Thus, suppose the facts which gave rise to *Wallwyn* v. *Lee* to be repeated.

Suppose an action to be brought in one of the Common Law Divisions of the High Court of Justice to recover from the innocent mortgagee of a fraudulent tenant for life the title deeds which the latter, representing himself to be owner in fee, had handed over simultaneously with the mortgage.

Here, it is conceived, the sub-section applies strictly and literally. A suit might have been brought in the

Court of Chancery for the purpose for which the action is brought, and the defence of purchase for value without notice is a defence not merely against giving discovery, but a defence to the whole action, except so far, indeed, as such action may embrace a claim for damages in default of recovery of the deeds themselves, to which last-mentioned claim the defence would be no answer.

The foregoing are the best conclusions which the writer has been able to arrive at in reference to the mode of determining whether the defence applies in any particular instance, and to the applicability of the defence in the particular instances discussed.

It must be admitted that these conclusions are not altogether satisfactory in result, and that the ascertainment of the applicability of the defence by means of inquiries into the nature and extent of the old Chancery jurisdiction must occasionally lead to investigations involving technicality rather than substance.

Thus although actions by widows for dower or by tithe owners for an account of tithes are hardly likely to occur now, so as to afford an opportunity of citing *Williams* v. *Lambe* or *Collins* v. *Archer* as cases directly in point, still the proposition treated by Lord Westbury as established by those cases, viz.: "that the defence "of purchase for valuable consideration did not apply "where the Court of Chancery exercised a legal "jurisdiction concurrently with Courts of Law," may at any future time give rise to the following four-fold technical investigation (that is to say):

(*a*) Could such an action as this have been brought in the Court of Chancery before the Judicature Acts?

(*b*) If so, would the jurisdiction of the Court of Chancery have been concurrent only with that of the Courts of Law?

(*c*) If so, is Lord Westbury's view as to the effect of the decisions of *Williams* v. *Lambe* and *Collins* v. *Archer* the correct view? or are those decisions to be treated as simply wrong?

(*d*) If the former, is the defence wholly or only partially inapplicable? (*a*)

But whatever may be the doubts or difficulties attending the solution of any particular instances that may occur, this seems clear, viz.: that for the present, at least, a thorough knowledge and understanding of the doctrine of purchase for value without notice, as it existed before the Judicature Acts, is a necessary preliminary to estimating its applicability to litigation arising under the Acts, and it is on this account that we have, in the earlier portion of this sketch, dwelt somewhat more fully than might at first appear necessary on the reported decisions by which the nature and extent of the defence was gradually ascertained and determined.

(*a*) See pp. 24, 25, 29, 30, ante.

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